

1 FRANCIS M. GREGOREK (144785)

gregorek@whafh.com

2 BETSY C. MANIFOLD (182450)

manifold@whafh.com

3 RACHELE R. RICKERT (190634)

rickert@whafh.com

4 WOLF HALDENSTEIN ADLER

FREEMAN & HERZ LLP

5 750 B Street, Suite 2770

San Diego, CA 92101

6 Telephone: 619/239-4599

7 Facsimile: 619/234-4599

8 MARK C. RIFKIN (*pro hac vice*)

rifkin@whafh.com

9 ALEXANDER H. SCHMIDT (*pro hac vice*)

schmidt@whafh.com

10 MARTIN E. RESTITUYO (*pro hac vice*)

restituyo@whafh.com

11 WOLF HALDENSTEIN ADLER

FREEMAN & HERZ LLP

12 270 Madison Avenue

New York, NY 10016

13 Telephone: 212/545-4600

14 Facsimile: 212/545-4677

15 Attorneys for Plaintiff Herbert H. Kliegerman

16 UNITED STATES DISTRICT COURT
17 FOR THE NORTHERN DISTRICT OF CALIFORNIA
18 SAN JOSE DIVISION

19 IN RE APPLE & AT&TM ANTITRUST)
LITIGATION)

Master File No. C 07-05152 JW

20)
21)
22)
23)
24)
25)
26)
27)
28)
HERBERT H. KLIEGERMAN on behalf of)
himself and others similarly situated,)

File No. C 08-948 JSW

Plaintiff,

**HERBERT H. KLIEGERMAN'S
SUPPLEMENTAL MEMORANDUM OF
LAW IN FURTHER SUPPORT OF HIS
MOTION FOR APPOINTMENT OF
INTERIM LEAD CLASS COUNSEL**

v.

APPLE INC. and AT&T MOBILITY LLC,

Defendant.

DATE: April 7, 2008

TIME: 9:00 a.m.

CRTRM: 8

JUDGE: Hon. James Ware

1 Plaintiff Herbert H. Kliegerman respectfully submits this supplemental memorandum of
2 law in further support of his motion to appoint Wolf Haldenstein Adler Freeman & Herz LLP
3 (“Wolf Haldenstein”) as interim lead class counsel for the Classes in these consolidated actions.

4 **I. ARGUMENT**

5 **A. Wolf Haldenstein Is Best Qualified To Fairly And**
6 **Adequately Represent The Interests Of The Classes**

7 When competing law firms seek to be appointed as interim lead class counsel, the Court
8 must appoint the firm that is best qualified to represent the interests of the class. Fed. R. Civ. P.
9 23(g)(2)(B) (“...the court must appoint the applicant best able to represent the interests of the
10 class.”). The papers submitted in support of the competing motions for appointment of interim
11 lead class counsel convincingly demonstrate that Wolf Haldenstein is the firm best able to conduct
12 this litigation on behalf of the Classes. None of the other firms seeking appointment as interim
13 lead class counsel can match Wolf Haldenstein’s lengthy experience, none of them can match
14 Wolf Haldenstein’s demonstrated leadership capabilities, and none of them can match Wolf
15 Haldenstein’s extensive resources with which to conduct the litigation.

16 As Plaintiff Kliegerman already explained in his opening brief, Wolf Haldenstein is fully
17 able and committed to staff and finance this action. As a national law firm with offices in New
18 York, San Diego, and Chicago, Wolf Haldenstein is widely recognized for its successful
19 prosecution of many of the largest and most complex class actions in courts throughout the United
20 States. Many of those cases were large antitrust class actions similar to this litigation. With more
21 than 50 attorneys practicing in all areas of the law, including 35 attorneys and 10 paralegals in its
22 Class Action Litigation Group, Wolf Haldenstein has more resources to devote to this case than all
23 of the other moving firms combined. *See* Wolf Haldenstein’s firm resume (attached as Exhibit 1
24 to the Affidavit of Alexander H. Schmidt in Support of Plaintiff Kliegerman’s Cross-Motion for
25 Appointment of Interim Lead Class Counsel, filed with the Court on March 3, 2008). Wolf
26 Haldenstein is so undeniably qualified to conduct this litigation on behalf of the Classes that none
27 of the other movants have even attempted to argue otherwise.

28 Moreover, Wolf Haldenstein already has expended considerable resources to identify,
investigate, and plead claims on behalf of the Classes in this action, and it will continue to do so.

1 Wolf Haldenstein's efforts to date include drafting Plaintiff Kliegerman's Amended Complaint,
2 that was filed in the Southern District of New York on November 16, 2007, communicating with
3 defense counsel for both Apple and AT&T, entering into a stipulation with both defendants
4 extending their time to appear, move or otherwise respond, and consenting to the transfer of the
5 case to this Court. Additionally, in an effort to conserve judicial resources, Plaintiff Kliegerman
6 moved to have his Action related to the instant Action. Thus, Wolf Haldenstein has demonstrated
7 its commitment to the efficient and successful prosecution of this action on behalf of the Classes.

8 **B. The Other Movants Are Not As Well**
9 **Qualified To Serve As Interim Lead Class Counsel**

10 By sharp contrast, the other firms seeking appointment as interim lead class counsel have
11 comparatively little antitrust class action experience, fewer resources, and cannot boast nearly the
12 same history of success as Wolf Haldenstein.

13 **1. The Law Office of Damian Fernandez Is Not As Well**
14 **Qualified To Serve As Interim Lead Class Counsel**

15 The moving papers demonstrate that the Law Office of Damian Fernandez does not have
16 the same experience or nearly the same resources as Wolf Haldenstein, and therefore should not be
17 appointed interim lead class counsel in this action.

18 The Law Office of Damian Fernandez, which relies on the services of only one attorney –
19 Mr. Fernandez himself – is out of its element in the area of complex class action litigation that is
20 required to prosecute the instant action. Mr. Fernandez, who graduated law school in 1999, has
21 only 8 years of litigation experience. He does not claim to have *any* experience in class actions,
22 complex litigation, or antitrust actions. Furthermore, given his status as a solo practitioner, it is all
23 but certain that Mr. Fernandez does not have sufficient resources to prosecute this Action against
24 the formidable legal team that defendants have hired to work on this case.

25 Mr. Fernandez had moved with the law firm of Girard Gibbs as interim co-lead class
26 counsel. Girard Gibbs – which did not appear in the case before moving for appointment as
27 interim co-lead class counsel with Mr. Fernandez and did nothing in the case other than move for
28 appointment as interim co-lead class counsel – has withdrawn or soon will withdraw as counsel.
Therefore, Mr. Fernandez cannot rely upon them to assist him in the prosecution of the Action.

1 **2. Max Folkenflik Is Not As Well Qualified To**
2 **Serve As Interim Lead Class Counsel**

3 Max Folkenflik, of the two-person law firm of Folkenflik & McGerity, also lacks both the
4 experience and the resources necessary to adequately represent the Classes of plaintiffs in this
5 case.

6 It is clear that Mr. Folkenflik, with only a two-person office located in New York City,
7 does not have the resources necessary to take on the sophisticated legal team being proffered by
8 the defendants in California in this case. Certainly, Mr. Folkenflik's small firm does not have
9 nearly the same level of professional or support staff capabilities, or infrastructure as Wolf
10 Haldenstein. In addition to lacking the resources necessary to prosecute this action, Mr.
11 Folkenflik proffers inadequate evidence of the relevant experience necessary to be appointed
12 interim lead class counsel.

13 Specifically, in his motion to be appointed interim lead class counsel, Mr. Folkenflik
14 purports to have significant technological, legal, and complex litigation experience. The bulk of
15 his experience in the area of antitrust litigation comes from working on three cases while he was
16 an associate at Cravath, Swaine and Moore, approximately 25 years ago. Declaration of Max
17 Folkenflik in Support of Motion to Appoint Max Folkenflik As Lead Counsel for Plaintiffs and the
18 Putative Class, ¶12, filed on March 3, 2008. Mr. Folkenflik does not claim any antitrust
19 experience, and certainly no leadership roles in any antitrust litigation, for the past 25 years.

20 Additionally, the majority of Mr. Folkenflik's "technological" and "complex litigation"
21 experience comes from his role in the case of *Hoffman v. American Express*, No. 2001-22881
22 (Cal. Super. Ct., Alameda County, filed 2001), a case which is currently still pending in Alameda
23 County, California. As proof of his experience in these areas, Mr. Folkenflik offers testimonials
24 from Joseph Caruso and Ronald M. Sabraw to vouch for his experience. Mr. Caruso, who is
25 obviously conflicted by the fact that he is currently assisting Mr. Folkenflik in the prosecution of
26 this Action, asserts that Mr. Folkenflik has significant technological expertise. Declaration of
27 Joseph Caruso in Support of Motion to Appoint Max Folkenflik as Lead Counsel for Plaintiffs and
28 the Putative Class, ¶1, filed on March 3, 2008. While Mr. Folkenflik may have some
technological expertise, he seeks appointment as interim lead class *counsel*. Apart from the

1 conflicted position Mr. Caruso occupies, his affidavit sheds no light on Mr. Folkenflick's ability to
2 serve in that legal capacity. Moreover, the technological expertise that Mr. Folkenflick claims to
3 have consists largely of his work on cases that involved significant document databases. As such,
4 his technological expertise is no greater than Wolf Haldenstein's own experience in cases
5 involving databases with tens (or even hundreds) of millions of pages of documents and other
6 data.

7 Mr. Folkenflick also offers the affidavit of Former Judge Sabraw, a former state court
8 judge who presided over the *Hoffman* case, No. 2001-22881, which is still pending. See
9 Declaration of Ronald M. Sabraw in Support of Motion to Appoint Max Folkenflick as Lead
10 Counsel for Plaintiffs and Putative Class, ¶2, filed on March 3, 2008. His Declaration is, to say
11 the least, highly unusual. Former Judge Sabraw attests to Mr. Folkenflick's skill in one case.
12 However much success Mr. Folkenflick ultimately may achieve for the class in *Hoffman v.*
13 *American Express*, the opinion of a former judge of his performance in that lone case does not
14 begin to approach Wolf Haldenstein's successful record over the past forty years. While Mr.
15 Folkenflick has submitted an affidavit from a former judge in one case, Wolf Haldenstein has
16 submitted more than a dozen opinions by judges acting in their official capacity praising the firm
17 for its skillful and effective advocacy on behalf of numerous classes of victims of antitrust
18 violations, securities fraud, and other corporate wrongdoing.

19 Neither 25-year old antitrust experience as an associate at a large law firm nor one
20 technologically demanding case that is still pending in the California state court makes Mr.
21 Folkenflick the most qualified interim lead class counsel. He has neither the resources nor the
22 experience that Wolf Haldenstein has, and thus should not be appointed as interim lead class
23 counsel in this action.

24 **II. CONCLUSION**

25 For these additional reasons, Plaintiff Kliegerman respectfully requests that the Court grant
26 the motion to appoint Wolf Haldenstein as interim lead class counsel and to deny the competing
27 cross-motions of Mr. Fernandez and Gerard Gibbs and of Mr. Folkenflick for appointment as
28 interim lead class counsel.

1 DATED: March 17, 2008

Respectfully Submitted,
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
FRANCIS M. GREGOREK
BETSY C. MANIFOLD
RACHELE R. RICKERT
MARISA C. LIVESAY

6
7 
8 FRANCIS M. GREGOREK

Symphony Towers
750 B. Street, Suite 2770
San Diego, California 92101
Telephone: 619/239-4599
Facsimile: 619/234-4599
gregorek@whafh.com
manifold@whafh.com
rickert@whafh.com
livesay@whafh.com

14 WOLF HALDENSTEIN ADLER
15 FREEMAN & HERZ LLP
16 MARK C. RIFKIN (*pro hac vice*)
17 ALEXANDER H. SCHMIDT (*pro hac vice*)
18 MARTIN E. RESTITUYO (*pro hac vice*)
19 270 Madison Avenue
20 New York, New York 10016
21 Telephone: 212/545-4600
22 Facsimile: 212/545-4677
23 rifkin@whafh.com
24 schmidt@whafh.com
25 restituyo@whafh.com

26 RANDALL S. NEWMAN, P.C.
27 RANDALL S. NEWMAN
28 The Trump Building
40 Wall Street, 61st Floor
New York, New York 10005
Telephone: 212/797-3737
Facsimile: 212/797-3172
rsn@randallnewman.net

SHABEL & DENITTIS, P.C.
STEPHEN P. DENITTIS (*pro hac vice*)
NORMAN SHABEL (*pro hac vice*)
5 Greentree Centre, Suite 302
Marlton, New Jersey 08053
Telephone: 856/797-9951
Facsimile: 856/797-9978
sdenittis@shabeldenittis.com

Attorneys for Plaintiff Herbert H. Kliegerman

APPLE:15917

DECLARATION OF SERVICE

I, MARTA STASIK, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 750 B Street, Suite 2770, San Diego, California 92101.

2. That on March 17, 2008, declarant served the following document

**HERBERT H. KIEGERMAN'S SUPPLEMENTAL MEMORANDUM OF
LAW IN FURTHER SUPPORT OF HIS MOTION FOR APPOINTMENT
OF INTERIM LEAD CLASS COUNSEL**

via the CM/ECF system to the parties listed on the attached service list.

3. That there is regular communication between the parties.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 17th day of March 2008, at San Diego, California.


MARTA STASIK

APPLE ANTITRUST

Service List – February 13, 2008

Page 1

COUNSEL FOR PLAINTIFFS

Francis M. Gregorek
Betsy C. Manifold
Rachele R. Rickert
Marisa C. Livesay
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
750 B Street, Suite 2770
San Diego, CA 92101
619/239-4599
619/234-4599 (fax)

Mark C. Rifkin
Alexander H. Schmidt
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
270 Madison Ave.
New York, NY 10016
212/545-4600
212/545-4653 (fax)
rifkin@whafh.com
schmidt@whafh.com

Randall S. Newman
NEWMAN & ASSOCIATES, P.C.
The Trump Building
40 Wall Street, 61st Floor
New York, NY 10005
212/797-3737
212/797-3172 (fax)
rsn@randallnewman.net

Stephen P. Denittis
Norman Shabel
SHABEL & DENITTIS, P.C.
5 Greentree Centre, Suite 302
Marlton, NJ 08053
856/797-9951
856/797-9978 (fax)
sdenittis@shabeldenittis.com

Counsel for Plaintiff Herbert H. Kliegerman

Damian R. Fernandez
LAW OFFICE OF DAMIAN R. FERNANDEZ
14510 Big Basin Way
Suite A, PMB 285
Saratoga, CA 95070-6091
408/355-3021
408/904-7391 (fax)
Damianfernandez@gmail.com

Geoffrey A. Munroe
Elizabeth C. Pritzker
Aaron M. Sheanin
GIRARD GIBBS LLP
601 California Street, 14th Floor
San Francisco, CA 94108
415/981-4800
415/981-4846 (fax)
gam@girardgibbs.com
ecp@girardgibbs.com
ams@girardgibbs.com

M. Van Smith
LAW OFFICES OF V. MAN SMITH
14510 Big Basin Way
Suite A, PMB 285
Saratoga, CA 95070-6091
408/355-3021
408/904-7391 (fax)
mvsmith@sbcglobal.net

Counsel for Plaintiffs Michael G. Lee, Dennis V. Macasaddu, Mark G. Morikawa, Vincent Scotti and Timothy Smith

APPLE ANTITRUST
Service List – February 13, 2008
Page 2

COUNSEL FOR PLAINTIFFS

Max Folkenflik
Margaret McGerity
FOLKENFLIK & MCGERITY
1500 Broadway, 21st Floor
New York, NY 10036
212/757-0400
212/757-2010 (fax)
max@fmlaw.net

H. Tim Hoffman
Arthur W. Lazear
Morgan M. Mack
HOFFMAN & LAZEAR
180 Grand Avenue, Suite 1550
Oakland, CA 94612
510/763-5700
hth@hoffmanandlazeare.com
awl@hoffmanandlazeare.com
mmm@hoffmanandlazeare.com

**Counsel for Plaintiffs Paul Holman
and Lucy Rivello**

COUNSEL FOR DEFENDANTS

Hanno F. Kaiser
LATHAM & WATKINS, LLP
885 Third Avenue, Suite 1000
New York, NY 10022
212/906-1252
212/751-4864 (fax)
Hanno.kaiser@lw.com

Adrian F. Davis
Alfred C. Pfeiffer, Jr.
Daniel M. Wall
Christopher S. Yates
LATHAM WATKINS, LLP
505 Montgomery Street, Suite 1900
San Francisco, CA 94111
415/391-0600
adrian.davis@lw.com
al.pfeiffer@lw.com
dan.wall@lw.com
chris.yates@lw.com

Counsel for Defendant Apple, Inc.

David E. Crowe
Daniel A. Sasse
CROWELL AND MORING LLP
3 Park Plaza, 20th Floor
Irvine, CA 92614-8505
949/263-8400
949/263-8414 (fax)
dcrowe@crowell.com
dsasse@crowell.com

Jeffrey W. Howard
Christopher E. Ondeck
William R. Smith
CROWELL AND MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2595
202/624-2500
202/628-5116 (fax)
jhoward@crowell.com
condeck@crowell.com
wrsmith@crowell.com

Counsel for Defendant AT&T Mobility, LLC

APPLE ANTITRUST
Service List – February 13, 2008
Page 3

COUNSEL FOR DEFENDANTS

Donald M. Falk
MAYER BROWN LLP
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306-2112
650/331-2030
650/331-2060 (fax)
dfalk@mayerbrown.com

Archis A. Parasharami
MAYER BROWN LLP
1909 K Street NW
Washington, DC 20006
202/263-33287
aparasharami@mayerbrown.com

Counsel for Defendant AT&T Mobility, LLC